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IN THE

Supreme Court of the United States

October Term, 1987

ALPHONSE PERSICO, JOHN DEROSS
and ANTHONY SCARPATI,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the Trial Court should have sequestered the jury for the entire trial as the defense requested due to the extensive nature of the publicity. Whether the government took advantage and created that publicity, and whether the Court had a right to sequester the jury on its own motion for deliberations after having denied the defense request initially.

2. Whether or not, as a matter of law, there was proof that Petitioner, Alphone Persico, knew that alleged conspirator was dealing with a government official. What is the requirement as to what specific knowledge is necessary for a conviction for bribery or unlawful gratuity under 18 U.S.C., Section 201 and relevant statutes.

3. A significant question is presented as to whether or not statements of a co-conspirator regarding other co-conspirators were in furtherance of the conspiracy.

Whether they were made during the course of the conspiracy and what is the specific interpretation of that doctrine.

4. Whether or not an overt act is required under a RICO conspiracy as opposed to other conspiracies.

5. Other questions adopted in Point V of this Petition which are specifically set forth in the Petition of Carmine Persico

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No.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

These are appeals by Petitioners, Alphonse Persico, John DeRoss and Anthony Scarpati, from a judgment of the United States Court of Appeals for the Second Circuit, decided December 9, 1987, with a thirty-seven page Opinion , which affirmed a judgment of the United States District

Court for the Southern District of New York, (Honorable John F. Keenan), rendered on November 13, 1986, convicting Petitioners of the crimes of RICO, RICO Conspiracy and various substantive crimes, pursuant to 18 United States Code, Sections 1961, 1962 and other substantive statutes. Alphonse Persico and John DeRoss each received twelve years and Anthony Scarpati received a total of thirty-five years.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. The Opinion of the United States Court of Appeals for the Second Circuit, reprinted at length in the Petition of Carmine Persico is hereby incorporated.

STATUTES INVOLVED.

18 U.S.C., Section 1961 Definitions

As used in this chapter --

(4) "enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group

of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, of which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

18 U.S.C., Section 1962 Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase

of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a),(b) or (c) of this section.

18 U.S.C., Section 201 — Bribery of public officials and witnesses

(a) For the purpose of this section:

"public official" means Member of Congress,

the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent --

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of value to any public official, former public official or person selected to be a public official, for or because of any official act performed or to be performed by such official, former public official, or person selected to be a public official.

FACTS

Petitioners, Alphonse Persico, John DeRoss and Anthony Scarpati adopt the Facts set forth in the Petition of Petitioner, Carmine Persico.

Petitioner, Alphonse Persico was only named in two predicate acts, which were the same acts for the RICO and RICO conspiracy and which were the same acts which constituted the bribery and gratuity counts; the Ashland situation which was conduct that had as its objective the obtaining of preferential treatment in prison for his father, Carmine Persico, by virtue of a claimed bribe or gratuity paid to Ernest Goss, and the count involving Joseph Inannuzzi, also known as Joe Dogs, where the government alleged that money was paid to their informant, Joe Dogs, in order to try to obtain a prison transfer for Carmine Persico while he was in prison.

The testimony against Alphonse Persico consisted of an insufficient amount to indict him prior to Frederick DeChristopher becoming a witness, because when Goss, the Unit Manager at Ashland, testified, he did not even mention

Alphonse Persico's name, except for the fact that after Carmine Persico got out of prison, Goss came to New York to visit Persico, who had become a friend, and Alphonse Persico picked him up at the airport once and went out to dinner with him and others on one or two occasions. Ernest Goss did not mention Alphonse Persico's name whatsoever with regard to any incidents while his father was an inmate at Ashland. That covered the time of Goss' two visits to Las Vegas under the name of Ernest Anderson, a name he had used in the past because of his extracurricular social activities.

The Government claimed that Goss was "comped" in Las Vegas during the 1979 and 1980 trips, but that testimony did not in any way involve Alphonse Persico other than the DeChristopher testimony, which we will mention hereafter.

Petitioner Alphonse Persico was present two times at the table when they went

out to dinner and was present once when Goss visited his father in Saugerties, New York. There is no testimony that petitioner picked up any of the dinner checks, paid for anything, gave Goss any money, gave Goss anything of value, or that he promised any of these things. In fact, Ernest Goss never even testified to any conversations whatsoever with Alphonse Persico. Goss said he came to New York on his own volition (7264),* and that he had dinner with Carmine Persico and petitioner at an Italian restaurant and again at the World Trade Center (7267-7269). He also was present at a dinner at the Stork Club, and while Goss did not pay for the dinner, he did not know who did, and there was no testimony that Alphonse Perscio was responsible for picking up the check (7269-7270). This was, it should be reiterated, a year after Carmine Persico left Ashland and was on parole.

* Numerical References are to Pages of the Trial Minutes

The only other testimony given by Goss was that petitioner Alphonse Persico was at his father's house when Goss visited him in Brooklyn, New York (7272), and on Goss' second trip to New York, Carmine Persico came to visit him at the Friar Tuck Resort upstate, and Alphonse was there (7276). Goss once had breakfast at the farm and Alphonse Persico drove him back to Brooklyn (7277). That was the last time Goss ever spoke to Alphonse Persico (7277). Both times when Goss came to New York he paid for his own airline tickets (7350), and Goss specifically testified that he never saw Alphonse Persico in Las Vegas (7363), and never discussed with Alphonse Persico his trips to Las Vegas (7364). Ernest Goss in no way testified against Alphonse Persico. He testified in a Brooklyn grand jury and in the grand jury in New York that heard the evidence regarding the original indictment, yet Alphonse Persico was never indicted in

either jurisdiction. The only additional evidence against Alphonse Persico at this trial was the testimony of DeChristopher.

Alphonse Persico was not a defendant in this case during the time when his father was at the DeChristopher house, so there seems to have been little reason for Carmine Persico to even mention his son or the Ashland situation. Carmine Persico is alleged to have fortutiously made the statement to DeChristopher that Persico got in touch with his son, meaning Allie-Boy, who called a fellow named Vinny Vingo, who live in Las Vegas and "had him comped" (13,724). Based on that testimony, and that testimony alone, a superceding indictment was handed down against petitioner. Goss travelled to Las Vegas under the name of Ernest Anderson and there was no evidence whatsoever to indicate that even if Alphonse Persico had arranged for Goss to be comped, that he knew Anderson

was in fact Goss or that Anderson was a prison official. Even assuming DeChristopher's testimony is true and admissible, there is no evidence that petitioner Alphonse Persico possessed the knowledge requisite to a finding of guilty of the gratuity involving Ernest Goss.

There was also a paucity of testimony with regard to the Joseph Iannuzzi portion of the case which involved attempts to effect prison transfers during Carmine Persico's last term in prison. The entire operation was a "sting" operation set up by the F.B.I., who directed the Bureau of Prisons to transfer Carmine Persico to different jails in order to give their informant, Joseph Iannuzzi, credibility. There was no evidence that petitioner or any other person, for that matter, knew that Joe Dogs was dealing with a government official, and it is quite reasonable to assume that they thought Joe Dogs' contact in Washington was an attorney or some-

one else who had a right to have communication with the Bureau of Prisons. Certainly, there was no evidence to indicate that petitioner Alphonse Persico knew that a prison official was involved or that he even knew that a bribe was involved or was even paid. The $20,000. payment allegedly made occurred in April, 1982 and the critical conversations in which petitioner's voice is heard on two tapes did not occur until August, 1982, some four months after the bribe was paid. The relevant portion of the conversations (A378-A384)* did not in any way indicate that Alphonse Persico knew about the bribe, participated in the payment or knew who the connection in Washington was. That conversation is consistent with many explanations, one of guilt being not the most reasonable. It must be remembered that a prominent Washington attorney, Roger Barth, testified at the trial and testified that he was

*"A" references are to pages of the Appendix

employed by Alphonse Persico and Carmine Persico's lawyer to try to legally deal with the Bureau of Prisons and obtain Carmine Persico's transfer back to the Northeast Region (15,722-15,780). In fact, there were meetings between Roger Barth and Norman Carlson, the Director of the Bureau of Prisons, and Gilbert Ingram, the Deputy Director (15,663-15,664, 15481-15,482, 15,489). Here, too, the case against Alphonse Persico was non existant until Frederick DeChristopher became a witness. The only mention of petitioner Alphonse Persico by DeChristopher was that Carmine Persico allegedly told DeChristopher he spoke to Allie about getting him the insurance on some companies Carmine Persico controlled (13,684), and that Allie was a good boy, he did everything he was told (13,740).

John DeRoss, also known as Jackie, was a business agent of the Hotel Employees and Restaurant Employees Union, Local 6 and Local 100, and it was alleged that he used his position to pay bribes to union officials, extort payments from restaurant owners and that the unions were controlled by the Colombo Family. Without going into the details of all of the evidence introduced with regard to Mr. DeRoss and the claims with regard to which restaurants paid bribes, it is sufficient to say that the jury acquitted petitioner of all these specific charges. The only thing that Mr. DeRoss was convicted of was RICO Conspiracy, and that involved the allegation that he conspired with others to violate the law regarding the different restaurants involved.

The basis of the entire conviction against Mr. DeRoss on the RICO Conspiracy involved a conversation he had on June 3,

1983 at the home of Paul Castellano, where he was present, as was another man, Anthony Amodeo, also known as Chick (A388-A422). That conversation, read in its entirety, was not a criminal conversation. It dealt with a jurisdictional fight between Local 6 and Local 100, and the question of a lease with regard to a particular building that some of the people had an interest in.

The only other evidence that can be considered with regard to this particular conviction is the evidence that Frederick DeChristopher gave when he said that when Carmine Persico was at the DeChristopher house after the indictment had been voted, Persico told him that John DeRoss was his front man in the hotel and restaurant unions (13,708). Persico also supposedly said that DeRoss controlled certain restaurants (13,709), and that he had used his influence to try to get some restaurants to buy some pasta and macaroni products (13,709-13,710).

The case against Anthony Scarpati consisted of two situations, to wit: two claimed illegal loans made to one, Arlyne Brickman, in the amount of $48,000., and one to Frank Ancona in the amount of $500. That was Mr. Scarpati's only involvement in the case at bar, and was the basis of his conviction in the RICO and RICO conspiracy counts, plus the Government's claim that he was involved in those counts as a member of the Enterprise, to wit: the Colombo Family. The evidence with regard to Mr. Scarpati's involvement in the Enterprise basically consisted of photographs of Scarpati in the presence of some of the other defendants in the case, which we submit was probative of nothing, since Scarpati, also known as Scappy, grew up with many of the defendants in this case and had known them all his life; plus the testimony of Frederick DeChristopher, who testified that Carmine Persico told him that he was Scappy's

Boss. The legal issues with regard to the admissibility of DeChristopher's testimony and the Bruton issue are the same as affects other petitioners because it is claimed that the testimony was inadmissible because it did not occur during the course of and in furtherance of the conspiracy.

THE BRICKMAN LOAN

Arlyne Brickman borrowed money from one, Vincent Manzo, and there were many tapes and videotapes in this case of conversations between Arlyne Brickman, Vincent Manzo and Vincent Manzo's girlfriend, Madeleine Calvoruso. The gist of all of the conversations was Vincent Manzo's vain attempts to get paid by Arlyne Brickman the monies that she had borrowed from him over a period of years. There were questions about whether or not the monies were actually borrowed or whether Arlyne Brickman ran up gambling debts which were then converted into a loan, but it really makes little difference because of

the fact that there is not single conversation in this case between Arlyne Brickman and Anthony Scarpati and the two were never observed to be with each other. The main issue, as far as Scarpati is concerned, is whether or not there was evidence linking him to the loan, or whatever else you want to call it, and whether any statements of Vincent Manzo with regard to that loan were threatening in order to collect the loan by saying it was attributable to Mr. Scarpati.

Manzo, in order to try to obtain repayment of the funds, told Arlyne Brickman that the money came from "Scappy". There is a lot of conversation where Arlyne Brickman tried to draw out Manzo by asking him how the money gets repaid, where does it get repaid and whether or not it really came from Scappy. There are many times during the conversations where Manzo said that it was Scappy's money, but each time Arlyne Brickman

wanted to meet Scappy, Manzo declined, and, in fact, there came a time when she insisted on meeting Scappy, and when the supposed meeting took place, it turned out that someone else attended the meeting impersonating Scarpati. That fact, in and of itself, is strong evidence that Scarpati knew nothing about the transaction, that it was not his money and that Vincent Manzo was simply using Scarpati's name to try to get Arlyne Brickman to pay him the money she owed.

Never during the course of the conversations did Vincent Manzo threaten her with violence, nor did he initiate any discussions where he told her that Scarpati would in any way hurt her.

THE FRANK ANCONA LOAN

The second act against Scarpati, which was both a predicate RICO act and a substantive charge, involved a $500. loan supposedly made to one, Frank Ancona, in January, 1982. Frank Ancona was little more than a moron who

could not read or write, and his testimony was so fantastic it should have been dismissed as a matter of law. This involves the question of whether or not, even though matters of fact are usually not matters for this Court, the facts were so devoid of any probative value that as a matter of law due process was violated. Without going into all of the facts, for example, Ancona claimed that he was thrown out of his house by Gennaro Langella because of loansharking debts, and he said he never went to a closing or signed a deed. He was asked to sign his name on a piece of paper in Court, which clearly was the same as appeared on the deed. His wife testified and admitted that it was his signature, and the attorney who handled the closing, a real estate practitioner for forty-three years, verified thst there was a closing, that Ancona was present and that it was his signature. Scarpati was charged with giving

this man $500. based solely upon the man's own word, which will be argued was absolutely incredible and could not be believed by any reasonable jury. The only reason Scarpati was convicted was because the trial took so long, the various conspiracies were so involved and the jury could not in any reasonable way segregate the lack of evidince against Scarpati. Also, the money was not given to Ancona by Scarpati, but by another individual. Tht was the total evidence against Scarpati, except that, as is the case with the other petitioners, DeChristopher testified that Carmine Persico told him that Scarpati worked for him (13,699-13,700), and that was the evidence that put Scarpati in the case.

We also raise other issues. For example, we dispute the right of the Court on its own motion, to sequester the jury for deliberations when it denied a defense motion at the beginning of the case to sequester the jury

for the whole case, and we questioned the Government's tactics with regard to the intentional dissemination of information to the news media during the course of the trial which was solely calculated to influence the jury. These issues, of course, apply to all petitioners in this case.

POINT I

THE TRIAL COURT SHOULD HAVE GRANTED THE DEFENSE REQUEST TO SEQUESTER THE JURY DURING THE ENTIRE TRIAL DUE TO THE EXTREME NATURE OF THE PUBLICITY ATTENDING THIS CASE, ESPECIALLY WHERE THE GOVERNMENT AFFIRMATIVELY ATTEMPTED TO TAKE ADVANTAGE OF THAT PUBLICITY. ONCE THE COURT DECIDED NOT TO SEQUESTER THE JURY IT HAD NO RIGHT TO SEQUESTER THE JURY ON ITS OWN MOTION FOR DELIBERATIONS.

Sequestration is a matter for the discretion of the Trial Court, and that question rests upon a Court's determination as to whether publicity in a case will be so pervasive as to deny a defendant a fair trial or whether or not there are other reasons to safeguard the integrity of the jury. Carter v. United States, 242 F.2d 608 (D.C. Cir. 1957); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968).

The entire question of sequestration and publicity is discussed at length in United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), which was the appeal dealing with the trial of John N. Mitchell, Harry R.

Haldeman and John D. Ehrlichman. Needless to say, that case involved a tremendous amount of pretrial publicity as well as media coverage during the trial, and the Court pointed out that the overwhelming bulk of the press reports consisted of straightforward, unemotional factual accounts of the events and of the progess of official and unofficial investigations. Other cases have gotten extensive media coverage, such as Baker v. United States, supra, the case involving Bobby Baker, a high government official; and United States v. Isaacs, 364 F.Supp. 895 (N.D. Ill. 1973), aff'd 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974), but in not one case was the publicity so widespread, so emotional and so sensationalized as in the case at bar.

Not only was the pretrial publicity so extreme, there was tremendous publicity during the course of the trial, publicity which was

generated by the United States Government, and which, we submit, deprived the defendants of their constitutional rights.

It is also interesting to note that the Supreme Court has indicated that when such pervasive publicity occurs, it is no solution to the problem to simply ask the jurors whether or not they had seen the publicity or been exposed to it, they would be able to put it out of their minds and still reach a fair verdict. In Marshall v. United States, 360 U.S.310 (1959), at pages 312-313, this Court held that in that situation the jurors had been summoned into the court chambers one by one, and that the seven jurors who had been exposed to the newspaper articles each told the Court that he would not be influenced by them and would decide the case only on the evidence presented. Nevertheless, this Court held that the prejudice to the defendant where there is extensive publicity was certain to be so great that ques-

tioning the jurors and eliciting responses that they could put the publicity out of their minds was not sufficient. See also, United States ex. rel. Doggett v. Yeager, 472 F.2d 229 (3rd Cir. 1973). The Yeager case also discussed the question of whether the prejudicial material had in part been the responsibility of the prosecutor in encouraging dissemination of the material.

This case presented a situation where the publicity was probably greater in scope in the New York area and also throughout the country than any other trial in history, except for the possibility of the Haldeman case which involved Watergate. However, as the Court pointed out in that case, the publicity did not involve violence, whereas in this case it involved all sorts of violent articles about the Mafia, killings, bombings and everything else. In addition,the publicity was at its worst during the trial, and the

most damaging publicity of all was generated by the United States Government. The Trial Court kept a day to day publicity file which shows the vast extent of media coverage that attended this case. The thing that sets this case apart from other cases is not only that some of the publicity was generated by the United States Government, but it was calculated to affect this trial. The Government should have known better than to allow its release during the trial and the Government sought to take advantage of the publicity in this very case. For example, during the course of this trial an article appeared on the front page of the Magazine Section of the Sunday New York Times written by the President of the United States. That article appeared on January 12, 1986, in which the President announced a war on organized crime, and the article was actually entitled, "Declaring War on Organized Crime", and was

written by President Ronald Reagan. First of all, the defense had doubts as to whether the President actually wrote the article, and at the beginning of the article there is a sentence in which the President states that he was asked to write the article but did not identify who made the request. The article did not present any sort of program for fighting organized crime, but what it did do is discuss one of the witnesses who actually testified in this case, James Frattiano, and indicated that President Reagan believed him. The article commended the work of the United States Attorney for the Southern District, Rudolph Giuliani, and it called him by his name, "Rudy". On the next court date, the defense en masse decried the Government's action in causing the President to write the arricle, and the defense expressed the desire to have a hearing to determine who asked the President to write the article and whether or not it was at the request of the Attorney

General, the United States Attorney or the prosecution in this case. The Court considered the application and denied the defense a hearing in a written opinion dated January 26, 1986 (A357-A361). The Court thought that it was absurd that the defense would want the President of the United States to be a witness.

There is authority for asking a President to testify such as the Haldeman case where President Nixon was scheduled to testify, but the only thing that made his appearance impossible was the fact that he was ill at the time and the Court decided that the value of his testimony did not outweigh continuing the trial.

Another event that occurred that could only have a devasting effect on the jury in this case was the murder of Paul Castellano in New York City in December, 1985, when this case was actually on trial and jurors were obviously exposed to reports of that

event in the media. The fact that made that situation even worse than it was was that the Government sought to take advantage of the publicity that attended that event. One of the petitioners, John DeRoss, put various witnesses on the witness stand in his case, which involved allegations that DeRoss was involved with RICO and RICO conspiracy involving certain unions. Mr. DeRoss called one, Margaret Rimmelin, who testified that Mr. DeRoss had nothing to do with the hotel division of the union of which he was an official. On cross examination, the United States Attorney, Mr. Baird, asked her two questions (15,971). He capsulized her testimony by saying, "I believe you testified that as far as you knew Mr. DeRoss had nothing to do with the hotel division of your union. Is that correct?" The answer was,"Yes." He then asked her only one other question, and that was, "I take it it is also true as far as you know, Paul Castellano

didn't have anything to do with that?" And the answer was, "No." Paul Castellano's name was not even mentioned in direct testimony and the question was obviously asked in bad faith. It is an incontrovertible fact that the clear intent of the question was to prejudice the jury by implication that Paul Castellano had something to do with the defendants in this case. Petitioner DeRoss also put on the witness stand one, Walter Smith, with regard to union contracts, and again on direct examination Paul Castellano was not mentioned or discussed. On cross examination (15,888), the prosecutor asked whether or not Paul Castellano had anything to do with the negotiations involving the contracts, and the witness replied that he did not know. The next question, which was obviously scandalous, was, "Do you know if Mr. DeRoss or Vito Pitta knew Paul Castellano?" The answer was, "I don't know." (15,887-15,888).

The witness was again asked whether or not Paul Castellano had anything at all to do with the Hotel-Motel Trade Council or Local 6A, and the witness replied, "Not to my knowledge."

Petitioner DeRoss also called Harold Silverberg, a Certified Public Accountant, who was the accountant for Local 100 and who described the workings and the officers of the two unions involved. The prosecutor asked him (15,884), "By the way, referring back to the unions and their officers, was a man named Paul Castellano ever an officer or trustee or have any other connection with the International Hotel Employees and Restaurant Employees Union?" The accountant said that he never ran across the name in the workings of the books. Then a further question was asked, also mentioning the name, Paul Castellano, and concerning which the witness also had no knowledge. For the prosecution to inject Mr. Castellano's name

into these proceedings where there was no relevant reason for doing so, was highly prejudicial and was an obvious attempt to put the name of Paul Castellano in the jury's mind, especially because they were obviously aware that he had been murdered.

Another significant area of publicity involved the report of the Presidential Commission on Organized Crime, which was issued in the middle of this trial, in which it was reported that the President's Commission found that the concrete and restaurant industries were controlled by the Colombo Family, and some of the names of defendants in this case were mentioned in the press coverage. These articles were also contained in the exhibits marked by the Court. On March 6, 1986, counsel complained that in the New York Daily News the Commission's report was disseminated. Counsel complained that Judge Kaufman, a Judge of the Second Circuit, who was the Head of the Commission,

was improperly wearing two hats, and that he very well knew it was wrong for the Commission to issue its report then and that it, no doubt, would affect this case. The report said the Colombo Family controlled the construction industry and the restaurant industry, and specifically mentioned John DeRoss, one of the petitioners, and it was pointed out that the conclusions reached by the Commission were two of the issues that had to be considered by this jury (9409-9413). There was also a gigantic headline on the front page of the New York Daily News that petitioner Carmine Persico had admitted to Frederick DeChristopher, who testified against him, that he had killed Albert Anastasia. The article was obviously written as a result of a newspaper reporter looking at a 302 report which was not received in evidence. Interestingly, the 302 report was not to that effect, so that the article was an obvious misquote. The jury, thus, had to

receive evidence or information about the killing of Mr. Anastasia, allegedly by Persico, was was not included in the trial, and whether or not members of the jury would admit it, there is absolutely no doubt that some of the jurors may have seen the bold faced headline in the newspaper. There was a newspaper story about someone being blown up in front of a restaurant in Brooklyn, apparently in retaliation for the killing of Paul Castellano. In that story, which also received extensive coverage in the press and on television, the name of defendant Gennaro Langella was mentioned. Sequestering the jury would have insulated them from that article, the Anastasia article and the Castellano article, and would have made it useless for the government to take advantage of the Castellano article by mentioning his name at the trial. Sequestration also would have made it impossible for the President's

Commission article and President's Regan's article to have an effect on the jury, even though those articles were generated by the government.

Once the Court denied the defense request to sequester the jury during the entire trial, there was no logical reason for the Court on its own initiative to sequester the jury for deliberations. Certainly the reason could not be to protect the jury, because if the jury was going home all during the trial they were as accessible to wrongdoing then as they would be during deliberations, and it obviously was not to insulate the jury from publicity. It goes without saying that during deliberations there is much less media coverage than there is when main witnesses testify, since the most that the media can report is just that the jury did not reach a verdict on each day of their deliberations.

The only effect that sequestering a

jury for deliberations can have is a negative effect on the defendants, and it obviously exerts pressure on the jury to convict.

A recent study was made by two professors of sociology, Charles Winick of City University of New York, and Alexander B. Smith of that University, which was reported in the New York Law Journal recently on December 12, 1986, Page 1. The title of the article is, "Post-Trial Sequestered Juries Tilt Toward Guilty Verdicts". The statistics of that study were that there are more guilty verdicts when juries are sequestered than when they are not, the reason being because the majority always exerts pressure on the minority and statistically more jurors lean toward conviction than acquittal. In any case, the inability of jurors to go home each night and recharge their determination to stick by their opinions, if honestly held, tends to exert pressure on jurors who are holding out

to change their view even though their conscientious opinions are not changed.

Since in this case there was not even a hint of any wrongdoing or improper approaches made to any of the jurors during a nine month trial, there was no reason whatsoever to lock them up during deliberations. The proof of the pudding is that after a weekend and a week of being sequestered, the jury returned their verdict on the following Friday. It is not coincidental that that Sunday was Father's Day. Obviously, the conclusions reached by Proffessors Winick and Smith were correct.

POINT II

THERE IS NO PROOF THAT PETITIONER ALPHONSE PERSICO KNEW THAT JOSEPH IANNUZZI WAS DEALING WITH A GOVERNMENT OFFICIAL. THE INTERPRETATION OF THE STATUTE AS TO WHAT SPECIFIC KNOWLEDGE IS REQUIRED HAS NOT BEEN LITIGATED.

Alphonse Persico was convicted of two bribery and gratuity predicate and substantive acts, which were the only charges leveled against him. These situations involved the Ernest Goss situation on one hand, where Frederick DeChristopher testified that Carmine Persico supposedly told him that Ernest Goss, the Ashland prison official, was comped on a trip to Las Vegas. The facts indisputably show that Ernest Goss occasionally used the name of Ernest Anderson, and had been using that name on occasion before he ever met Carmine Persico, due to the fact that he did not want his wife to know about his extracurricular activities. Taking DeChristopher's testimony at its face value, there was no evidence whatsoever in the case

that even if Alphonse Persico arranged for the favors in Las Vegas that he knew he was arranging them for a prison official. The same issue presents itself with regard to the Joseph Iannuzzi situation, a man who claimed that he had some sort of connection in Washington for moving prisoners around, although there was no evidence that this connection was anyone more than a lawyer or some other undesignated person. We are, thus, faced with the question regarding both charges of what sort of knowledge is required by 18 United States Code, Section 201. That statute on its face requires knowledge that the person charged was dealing with, directly or indirectly, a public official, and it is submitted that the failure to prove that issue invalidates the conviction, runs afoul of the statute and is a violation of due process.

It has been held in the leading case of United States v. Jennings, 471 F.2d 1310

(2nd Cir. 1973), that the government is required to prove that the offeror of the bribe or gratuity must know he is dealing with a government official, acting or who acted in his official capacity. In that case, the defendant did not know that the recipients of the bribe were F.B.I. agents, but it was thought that they were government officials of some government, and the bribe was made with intent to influence their action. It was believed that the agents were city cops observing the defendants' gambling and policy operation. The Second Circuit Court held that it was not required that the defendants knew that the agents were F.B.I. agents, but it was sufficient if they knew or believed that they were trying to corrupt a public official, regardless of what sovereign the official was allegedly acting for. The sole scienter required was the knowledge that an official was involved and the intent to

influence the act of that official, past or present, is an absolute requirement.

It was held:

> "In short, culpability turns upon the defendant's knowledge or belief that the person whom he attempts to bribe is an official having authority to act in a certain manner and not on whether the official possesses federal rather than state authority."

United States v. Jennings, supra, at page 1313.

Other cases support that principle and it is clear that the same principle applies whether or not the conduct amounts to a bribe or a gratuity. United States v. Irwin, 354 F.2d 192, cert. denied, 383 U.S. 967 (2nd Cir. 1965); United States v. Kenner, 354 F.2d 780, cert. denied, 383 U.S. 958 (2nd Cir. 1965).

There was no evidence whatsoever that Alphonse Persico offered any money or thing of value to Ernest Goss, the prison official at Ashland, where his father was incarcerated. Mr. Goss did not in any way implicate Alphonse Persico and, in fact, the

only evidence against him was Frederick DeChristopher's testimony that Carmine Persico, Alphonse's father, told him that he had his son "comp" Ernest Goss in Las Vegas through Vincent Vingo. For the reasons set forth in another portion of this petition we believe that the testimony of DeChristopher was totally inadmissible and we note that before DeChristopher gave that information to the government, Alphonse Persico was not even indicted. We also suggest, however, that taking DeChristopher at face value, that the testimony itself plus the exhibits in the case, clearly show that there was no evidence that Alphonse Persico knew who was being comped in Las Vegas or that a prison official was, indeed, involved.

Again, if we take DeChristopher's testimony at face value, the only inference possible would be that Carmine Persico told

DeChristopher that he had told his son to have Ernest Anderson comped in Las Vegas. There is no evidence to show that he allegedly told his son that Anderson was Goss, what the reason for comping Anderson was, or that Anderson was in any way a public official.

The same issue presents itself with regard to the Joseph Iannuzzi testimony. There was no testimony whatsoever that anyone knew that a prison official was involved in the supposed transfer and Joseph Iannuzzi acknowledged on many occasions that he never specifically told anyone who his connection was, what position he supposedly occupied or that the man was in any way connected with the United States Bureau of Prisons. In addition, there is no other testimony which shows knowledge on the part of Carmine Persico or Alphonse Persico that a prison official was involved or that these attempts to bribe anyone whatsoever were made on Carmine Persico's behalf.

POINT III

THE TESTIMONY OF FREDERICK DeCHRISTOPHER WITH REGARD TO STATEMENTS THAT CARMINE PERSICO MADE REGARDING OTHER DEFENDANTS ARE COMPLETELY INADMISSIBLE.

Certain defendants were not indicted until Frederick DeChristopher became a witness after the apprehension of Carmine Persico. After that arrest this indictment was handed down in March, 1985 and Alphonse Persico was added to the indictment, together with Hugh McIntosh and Andrew Russo. It is clear that without the statements of DeChristopher there was not a sufficient amount of evidence upon which to base an indictment and the added parties would not have been involved in this case at all.

DeChristopher testified that Carmine Persico told him that he had his son arrange for Ernest Goss, the prison official concerned in the Ashland bribery situation, to be "comped" in Las Vegas, and that it was done through one, Vincent Vingo. We have

discussed elsewhere the fact that Goss travelled under the name of Anderson, as was his custom, and that there is absolutely no evidence to show that even if Carmine Persico's statements were true,that Alphonse Persico knew that Anderson was really Goss, hence that Anderson was a prison official. We submit that without that testimony and other testimony of Frederick DeChristopher this case should not have been given to a jury.

The testimony of DeChristopher violated the other co-defendant's Bruton rights, in that the testimony consisted of out of court statements by a co-defendant who did not testify and who could not be subject to cross examination. Bruton v. United States, 391 U.S.123 (1968); Delli Paoli v. United States, 352 U.S. 232 (1956); United States v. Tille, 729 F.2d 615 (9th Cir. 1984); United States v. Howard, 757 F.2d 220, cert. denied, sub nom Shelton v. United States,

105 S.Ct. 3506 (6th Cir. 1985); United States v. Phillips, 664 F.2d 971 (11th Cir. 1981). Also, the statements related by Carmine Persico were not made during the course of the conspiracy or in its furtherance.

In United States v. Tille, supra, the Court very clearly enunciated the principle of law that even in the case of tapes, statements made by co-conspirators after the end of the conspiracy cannot be in furtherance of its objectives. United States v. Tille, supra; United States v. Miller, 676 F.2d 359,364 (9th Cir.), cert. denied, 459 U.S. 856 (1982). The Court and other Courts have clearly recognized that there are two aspects to the principle. The first is that the conspiracy must not have been ended, and the second is that the statements must be in furtherance of that conspiracy. In other words, even if the conspiracy is held to still be in existence and statements are not

in furtherance of that conspiracy, then the testimony is still inadmissible. This was a specific holding in United States v. Howard, supra, where the Court specifically concluded that the conversations occurred during the conspiracy but that they were not made in furtherance of it.

> "Although we conclude that the recorded conversations took place during the course of the conspiracy, we cannot find that the statements were made in furtherance of the conspiracy.The statements did nothing to advance what we have determined to be the remaining objective of the conspiracy, which was to obtain the insurance proceeds."

United States v. Howard, supra, at 230.

The Court also held that declarations made after a conspiracy has terminated in an attempt to prevent detection are not statements made in furtherance of the main conspiracy, and consequently are inadmissible. The Court cited Grunewald v. United States, 353 U.S. 391 (1957) and Lutwak v. United States, 344 U.S. 604 (1953).

The Court commented on Krulewitch v. United States, 336 U.S. 443 (1949), and it recognized that in some conspiracies attempts to prevent detection were inherent parts of the conspiracy, but such was not the case in the Howard case, and it is not the situation here. The government would have to prove that one of the central aims of the conspiracy continued in being, and certainly that would not be the case once there is an arrest and indictment, such as we have here.

In fact, in Howard, the Court specifically stated:

> "A conspiracy is deemed to have ended when the last objective is achieved, when all co-conspirators have been arrested, or when achievement of the objective has otherwise been rendered impossible."

United States v. Howard, supra, at 229.

It is clear that in the case at bar the statements allegedly made by Persico about other people under indictment occurred after the indictment was handed down, so that the government can in no way claim that

the conspiracy still existed. In addition, the evidence adduced cannot be held to have been in furtherance of any conspiracy but, at best, there were so-called admissions on behalf of Persico, and as far as statements about other defendants are concerned, they clearly violated Bruton v. United States, supra.

It is absolutely clear that with respect to every defendant in this case other than Carmine Persico, the DeChristopher testimony that Persico related things to him which allegedly inculpated these defendants, violated their constitional rights. Bruton v. United States, supra, is absolutely clear that those statements were inadmissible and, as the Bruton Court itself held, such statements are incriminations which are devasting to a defendant, especially where the maker of the statements does not testify. The Second Circuit has very carefully and definitely followed Bruton, and has left no

doubt that statements by a defendant about his involvement in a prior criminal act, even if admissible against him as an admission,are not admissible against the other defendants where the conspiracy was not still ongoing and where the statements are not in furtherance of it. United States v. Pedroza, 750 F.2d 187 (2nd Cir. 1984); United States v. Santana, 503 F.2d 710, cert. denied, 419 U.S. 1053 (2nd Cir. 1974); United States v. Pacelli, 491 F.2d 1108, cert. denied, 419 U.S. 826 (2nd Cir. 1974).

For co-conspirator statements to be admissible there must be evidence that the conspiracy still existed at the time the statements were made. In other words, they must be made during the course of the conspiracy and also in furtherance of it. United States v. Watchmaker, 761 F.2d 1459, reh. denied, 755 F.2d 1943 (11th Cir. 1985); United States v. Lewis, 759 F.2d 1316 (8th Cir. 1985); United States v. McLernon, 746

F.2d 1096 (6th Cir. 1984).

Even if it can be assumed that the testimony by a defendant about his own involvement in a prior criminal act can be admissible, it could only be admissible against him as an admission, if so qualified, but it is not admissible against other defendants, because as to them, the conspiracy is ended, the statements were not in furtherance of the conspiracy and they cannot be deemed to be an admission of other people where they were not were not part of the antecedent act in any event. United States v. Pacelli, supra; United States v. Pedroza, supra; United States v. Busch, 758 F.2d 1394 (10th Cir. 1985); United States v. Sperling, 726 F.2d 59, cert. denied, 104 S.Ct. 3516 (2nd Cir. 1984).

The government must prove that a central aim of the conspiracy remains in being when the statements were made and the statements were directed at the conceal-

ment and were at least partly calculated to further the ends of the conspiracy. United States v. Howard, supra; United States v. Castellano, 610 F.Supp. 1359 (D.C.N.Y. 1985). In this case, obviously, since the defendants had already been indicted in October, 1984, there is no possible way that the concealment of Carmine Persico has anything to do with the various conspiracies alleged in the indictment, assuming that there was a concealment, and there was no demonstration that such was the case, since it also must be remembered that no evidence of flight as such was introduced and no charge with regard to flight was given or requested by the government. It was also Mr. Persico's contention that this was not flight in any event, since his aim was to return at some point to fight the case, so that in no way can the fact of his stay at the DeChristopher house be related to any particular aim of the con-

spiracy or said to have been made in furtherance of it.

The Courts have universally held that there can be no furtherance of a conspiracy that has ended, except where the conspiracy to conceal is an inherent part of the conspiracy itself, and once the central criminal purpose of a conspiracy has been attained, a secondary conspiracy to conceal cannot be implied merely by a showing that the main conspiracy was kept secret and the participants desired to escape detection and punishment. United States v. Gonzalez, 510 F.Supp. 568 (D.C.R.I. 1985); United States v. Grizzo, 735 F.2d 1318 (11th Cir. 1984); United States v. DeLuna, 763 F.2d 897 (8th Cir. 1985); Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Barnes, 586 F.2d 1053 (C.A. Fla. 1978); United States v. Lam Lek Chung, 433 F.2d 58 (2nd Cir. 1976); United States v. Muller, 550 F.2d 1375, cert. denied, 434 U.S. 971 (C.A. Tex. 1977).

It is most respectfully submitted that all of the DeChristopher testimony regarding statements made by Carmine Persico reflecting what other co-defendants told him is entirely inadmissible and is insufficient on which to base a conviction. This is true with regard to his son, Alphonse Persico, as well as other co-defendants.

Specifically DeChristopher testified that Carmine Persico told him Ralph Scopo was his man in the concrete industry at a time when they were allegedly watching television and saw Scopo arrested. That could not possibly have been true because Persico had not yet arrived at the DeChristopher house when the Scopo arrest took place, a fact which has never been controverted by the government. In other words, it is beyond any shadow of a doubt that DeChristopher lied when he said that Carmine Persico told him that. Thus, the connection between Scopo and the Enterprise is a false one.

The same is true with regard to Gennaro Langella. DeChristopher said that Persico told him that Langella was running the Family and was involved in the construction enterprise, and also with regard to another petitioner, John DeRoss, who was convicted of only one count in this indictment. His only connection with the Enterprise was DeChristopher's statement that Persico told him that DeRoss was Persico's man in the hotel and restaurant employees union. Here, too, that statement was not made during the course of a conspiracy, and the only other evidence with regard to DeRoss was one tape in which he had a conversation with Paul Castellano at Castellano's home. Nothing in that tape indicated that DeRoss was a member of the Enterprise or that the conversation was criminal in nature. It was only DeChristopher's testimony that supported the conviction of DeRoss (13,708-13,709).

The same issue applies to Anthony Scarpati, another petitioner. Here, too, DeChristopher provided the only testimony linking Scarpati to the Enterprise by testifying that Carmine Persico told him that Vincent Manzo, the man who actually lent the money to Arlyne Brickman, took it from Scarpati and put it out on the street, and also that Scarpati worked for Persico (13,599-13,700). There was no direct evidence against Scarpati and, in fact, during a very important surveillance where the government thought Scarpati was going to meet Manzo and possibly Arlyne Brickman, all sorts of agents were in the area. No photographs were taken, the testimony was conflicting and Arlyne Brickman never even showed up (9060-9548). In addition, the government did not prove that there were any federal extortionate credit transactions involving Scarpati. There was no proof of Scarpati's reputation, no threats were linked

to him, and the government did not even introduce evidence tending to show his reputation as to his collection practices in the community at the time of the extension of credit. United States v. Dennis, 625 F. 2d 782 (8th Cir. 1980); United States v. Natale, 526 F.2d 1150, cert. denied, 425 U.S. 950 (2nd Cir. 1975); United States v. Gigante, 729 F.2d 78, cert. denied, 104 S. Ct. 2390 (2nd Cir. 1984); United States v. Sears, 544 F.2d 585 (2nd Cir. 1976).

When one eliminates the DeChristopher testimony there is simply no evidence, and even DeChristopher's testimony that Scarpati worked for Persico (13,700) is not evidence which buttressed their case in terms of the requirement that the government prove force or violence regarding Scarpati's collection practices or the terms of the specific loans involved. In fact, there was not even real evidence of usuary.

POINT IV

THE QUESTION OF WHETHER AN OVERT ACT IS REQUIRED WHERE A RICO CONSPIRACY IS CHARGED IS A NEW ONE WHICH SHOULD BE CONSIDERED BY THIS COURT.

Petitioner, John DeRoss, specifically, but other petitioners as well, raise the issue as to whether an overt act is required where a RICO conspiracy is charged. This is especially true about DeRoss, because the only evidence against him is a conversation which occurred on a tape recording obtained at the house of Paul Castellano. Hence, there are no acts that petitioner DeRoss was found to have committed. The specific issue as to whether an overt act is required where a RICO conspiracy is charged has just recently arisen, and the Tenth and Sixth Circuits have held that an overt act is not required to satisfy a RICO conspiracy charge. 3rd RICO Law Reporter, Pages 667-668, May 1986; United States v. Hampton, 84-2704, __F.2d __,

(10th Cir. 1986); United States v. James, 85-1144 __F.2d__ (6th Cir. 1986).

Apparently the Eleventh Circuit held the same way in United States v. Carter, 721 F.2d 1514 (11th Cir. 1984), but other Courts did not agree. Medallion TV Enterprises, Inc. v. Select TV of Cal.Inc., 3rd R.L.R. 310 (D.C. Cal. 1985). Even in the Carter case, where the Court of Appeals did not hold that an overt act was not required as a conspiracy decision in the case, it noted that the Trial Court simply gave the appellant the benefit of a requirement that an overt act in furtherance of the conspiracy be proven by the government. United States v. Carter, supra, at 1528, footnote 20. THe Court then indicated that it had decided that the RICO conspiracy did not require proof of an overt act in United States v. Coia, 719 F.2d 1120 (11th Cir. 1983). However, the Eleventh Circuit is one of the Circuits that has held that a criminal agreement that two acts be committed is

sufficient under the law to satisfy a RICO conspiracy. The Second Circuit, in United States v. Ruggiero, 726 F.2d 913, cert. denied, 105 S.Ct. 118 (2nd Cir. 1985), as well as the First Circuit in United States v. Winter, 553 F.2d 1120,1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983), have held that a defendant charged with a RICO conspiracy must agree to personally commit two or more predicate crimes, and that it is insufficient that he agree to the commission of two or more predicate crimes by co-conspirators. Thus, it seems that if the personal requirement established in the Ruggiero case is the law, then an overt act should also be required.

There was clearly no overt act proven with regard to John DeRoss because the conversation in the Castellano house was the only evidence that related to the RICO conspiracy. In fact, that conversation was not the result of a tapped telephone, so that

the government could not claim DeRoss picked up a telephone instrument to make or receive a call. That conversation was intercepted by means of a court ordered bug, and there is no proof in the record that DeRoss did anything else but talk.

POINT V

PETITIONERS, ALPHONSE PERSICO, JOHN DeROSS AND ANTHONY SCARPATI ADOPT THE POINTS SET FORTH IN THE PETITION OF CARMINE PERSICO.

ALPHONSE PERSICO SPECIFICALLY ADOPTS THE CONTINGENCY FEE POINT SET FORTH IN CARMINE PERSICO'S PETITION.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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